No. 20667

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESS H. NICHOLAS, JR.,	)
Appellant	)
-vs-	)
ECRETARY OF THE DEPARTMENT OF NTERIOR, AND THE NITED STATES OF AMERICA	)
Apellee.	)

BRIEF OF APPELLANT

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MISCELLANEOUS:

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20667

JESS H. NICHOLAS, JR., Appellant,

vs.

SECRETARY OF THE DEPARTMENT OF INTERIOR, AND THE UNITED STATES OF AMERICA, Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

STATEMENT OF JURISDICTION

The Appellant, pursuant to Rule 73, Federal Rules of Civil Procedure, and Rule 18(b) of the Rules of the United States Court of Appeals for the Ninth Circuit, files this statement of the basis on which the United States Court of Appeals for the Ninth Circuit has jurisdiction in this case.

The case was heard in the Federal District Court on an appeal from a decision of the Secretary of the Department of the Interior, affirming a Decision of the Bureau of Land Management, Division of Appeals, rejecting appellant's offer of final proof for issuance of a homestead patent to 5 U.S.C. §1009, Administrative Procedure Act. The Bureau of Land Management,

Division of Appeals affirmed the decision of the Bureau of Land Management Land Office.

Jurisdiction in this case is founded on the existence of a Federal question and the amount in controversy. The action arises out of the homestead laws of the United States including but not limited to revised Statute §2291(1875), as amended, 43 U.S.C.A. §164 (1958). The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

The jurisdiction of the court is not at issue in this case. The Division of the Federal District Court was a final decision and appears in the Record at pages 85-86. Appeal to the Court of Appeals is made pursuant to 28 U.S.C.A §1291.

II. QUESTIONS PRESENTED

A. Whether or not the Court erred in relying on the administrative decision as having a "rational basis."

B. Whether or not the Court erred in not permitting the administrative record to be amplified.

C. Whether or not the Court erred in failing to find the Secretary of the Department of the Interior abused his discretion when he did not find that cultivation had been accomplished by the Appellant.

D. Whether or not the Court erred by not granting Appellant' prayer for equitible relief.

III. SPECIFICATION OF ERRORS

A. The Court erred in relying on the administrative decision as a "rational basis."

B. The Court erred in not permitting the administrative record to be amplified.

C. The Court erred in failing to find the Secretary of the Department of the Interior abused his discretion when he did not find that cultivation had been accomplished by the Appellant.

D. The Court erred by not granting Appellant's prayer for equitible relief.

IV. STATEMENT OF THE CASE

Jess H. Nicholas, Jr.'s (appellant) homestead entry for the South 1/2 South 1/2, Sec. 26, Township 3 North, Range 12 West, Seward Meridian, Alaska, was allowed on August 3, 1956. Appellant filed final proof on July 20, 1961, stating the following: He was a native born citizen of the United States; he was married and the father of two children; he was the person who made homestead entry on the above premises; the residence claimed was made upon the original entry; actual residence was established August 10, 1956; he established a habitable house on the land; the house became habitable on August 10, 1956. The periods of actual residence on the land were stated to be:

Residence Year	Appellant's Residence From	To	Family Residence From	To
1956	Aug 10,1956	Aug 1,1957	Aug 10,1956	Nov 20,1957
1957	Oct 30,1957	Nov 20,1957		
1958	Mar 25,1958	Feb 28,1960	Mar 28,1958	Feb 28,1960

Periods of absence from the land and reasons given included:

Residence Year				
1957	Aug 1, 1957	Oct 30,1957	Claimant	Working Aleutian Islands
1957	Nov 20,1957	Mar 25,1958	Both	Vacation in various states

Actual agricultural use of the land was stated to be:

Year	Crop	Acres Cultivated	Grazing Use	Reason for Cultivating Less Acreage than required by law
1957	Alaska Timothy	3 (not harvested)	None	Unable to find someone to clear land
1958	Rye	10 "	None	"
1961	Rye	7 "	None	"

The list of improvements placed on the lands in the homestead included:

Description	Year Made	Value of Materials	Value of Labor	Total Value
16' x 20' cabin	1956	$2200.00	$500.00	$2700.00
7' x 14' porch on cabin	1957	400.00	50.00	450.00
26' x 30' concrete basement	1958	1000.00	400.00	1400.00
Gravel road built	1958		560.00	560.00

The present value of the improvements was given as $6000.00.

Appellant further stated that the land was not within the limits of an incorporated town or selected site of a city or town; the homestead was not used for trade or business, there were no indications of minerals; he had not sold conveyed, agreed to sell or convey, or optioned, mortgaged, or agreed to option or mortgage the land, or any part of it; he had not made another homestead entry, or any other entry; and that he had not

heretofore perfected or abandoned an entry made under the homestead laws of the United States (R 14-16).

The final proof offered by the appellant was rejected on the basis that appellant failed to cultivate one-eighth of the area of the entry during the third and fourth years of the entry, as required by 43 U.S.C.A §164.

In his appeal to the Bureau of Land Management, Division of Appeals, appellant explained that the land office had informed him that cultivation of the land was not required during the first three years as all of the clearing was done during those years. In spite of this explanation, the Division of Appeals held that the cultivation requirement was mandatory and could not be excused by Bureau of Land Management employees.

On appeal to the Secretary of the Department of the Interior, appellant further explained that the three acres planted in 1957 and the ten acres planted in 1958 were planted in perennial grasses which did not require cultivation. He repeated his explanation that if he failed to meet the cultivation requirements, it was because of misleading information received from Bureau employees. He requested that he at least be awarded a homestead of 104 acres, based upon the cultivation of 13 acres. Although the assistant solicitor who

wrote the decision for the Secretary of the Interior conceded that the Department has not laid down a fixed rule as to what constitutes cultivation, the solicitor held that appellant's cultivation was not sufficient.

The appellant explained that it has been Bureau policy in the area in question not to require cultivation every year until application is made for patent and, further, that the Bureau has waived cultivation requirements in other applications for patent. The decision of the Secretary by the assistant solicitor held that cultivation requirements are mandatory and no departure therefrom is permissible (R 47).

Pursuant to 5 U.S.C.A. §1000-11, Administrative Procedure Act, the Alaska Federal District Court granted judicial review of the Decision of the Secretary of the Department of the Interior (R 35). The District Court handled the matter as a motion for summary judgment (R 36). Appellant repeated his former testimony before the District Court. He testified that he cleared and cultivated 20 acres of the land in question (R 78). He also testified that among other efforts, he and his wife had pulled a 12 ft. log, weighing over 100 pounds back and forth over the land by hand in an effort to prevent erosion. In spite of the appellant's unrebutted testimony, the Alaska Federal District Court, in a

one page decision, granted summary judgment for defendant, Secretary of the Department of the Interior.

"The court now finds that the construction of the law in connection with the administrative decision complained of has a rational basis and that the findings of fact are supported by substantial evidence on the record as a whole. The Court therefore concludes that defendant is entitled to summary judgment as a matter of law." (R 85)

V. SUMMARY OF ARGUMENT

A. The Court erred in relying on the administrative decisio as having a rational basis.

It is not sufficient that an administrative decision which construes the law, has a "rational basis" to sustain it on appeal. If only a "rational basis" were required, there would be no uniformity whatsoever in the interpretation of status and regulations. There are several rational approaches to the interpretation of statutes and regulations pertaining to homesteading. Howe a decision must have more than a "rational basis" to provide guide lines for both homesteaders and agency employees.

The decision of the Secretary did not have a rational basis in that the Secretary applied regulations and instructions which were not in effect at the time Appellant was proving up on his patent. Also, the Secretary utilized regulations which were not applicable to Alaska.

In his decision, the Secretary admitted that there is no fixed standard as to what constitutes cultivation. Nevertheless, the Secretary applied a stringent rule of cultivation which was not in effect at the time of Appellant's effort.

The Land Office denied Appellant's final proof on the basis that Appellant did not cultivate one-eighth of the acreage during the third and fourth years of the entry. However, the

Division of Appeals inserted the argument that Appellant's method o planting was insufficient.

B. The trial court erred in not permitting the administrative records to be amplified.

C. The Court erred in failing to find the Secretary of the Department of the Interior abused his discretion when he did not find that cultivation had been accomplished by the Appellant.

The decision of the Secretary was not based on substantial evidence. As stated above, the various appeal levels of the Department of the Interior switched position in refusing to issue patent. Retroactive and inappropriate regulations were applied. The course of conduct of the Department has been liberal in favor of homesteaders. Appellant was misled by statements of employees of the Department of the Interior and did not cultivate one-eighth of the land during the third and fourth years of the entry because of his inability to obtain a tractor. Therefore, the Secretary is estopped to deny the issuance of the patent.

Contrary to the Secretary's position, there is sufficient elasticity under the appropriate statutes to issue patent. Cultivation requirements have not been strictly enforced by the Departme in other instances.

D. The Court erred by not granting plaintiff's (Appellant's)

prayer for equitable relief.

Homesteaders are entitled to preferred treatment and protection under the Homestead statutes. In the instant case, rather than being given preferred treatment, Appellant was mistreated. As stated above, Appellant relied on statements by Department employees. In place of giving Appellant the preferred treatment to which he is entitled, the Department switched positions and utilized inappropriate regulations and instructions and attempted to apply them retroactively. Further, although the Department concedes there is no standard of "cultivation", a rigid, retroactive and inappropriate standard for cultivation was applied to the Appellant. The reprehensible conduct of the Department of the Interior in this and other cases has led to a public distrust of the Department with a resulting lag in the enjoyment by individuals of the blessings of the American dream through the utilization of federal programs. Actions such as those utilized by the Department of the Interior in this case have been condemned not only by courts but by congressional committees as well.

The appellant has fought through three levels of administrative procedures and two levels of judicial appeal over a period of fi years. He has shown that he is at the very least, entitled to equitable relief in the form of a patent with subsurface rights to 104 acres of the land in controversy.

VI. ARGUMENT

A. The court erred in relying on the administrative Decision as having a rational basis.

An administrative decision should have more than a "ration basis". There may be several rational approaches to the interpretation of statutes and regulations. A decision must have more than a "rational basis" if it is to provide guidelines for homesteaders and agency employees.

The phrase "rational basis" is merely a verbal formula. Its inconsistent application has confused a leading authority in the field of administrative law. See discussion of "rational basis" in 4 Davis Administrative Law §§ 30.12-14.

> Close analysis of the ways of the Supreme Court in reviewing administrative action yields the rather clear conclusi that the scope of review in any particular case depends much more upon the various factors that guide the exercise of judicial discretion than it does upon judicial fidelity to any verbal formula. Ibid. at page 270.

Even if the "rational basis" test is applied, the decision of the Secretary will not stand. "Rational" is defined as "agreeable to reason: Intelligent, sensible." Webster's Third New International Dictionary.

The decision of the Secretary does not qualify under the above definition. Although the Secretary conceded that there is no standard of cultivation, the Secretary insisted upon a strict appli-

cation of this non-standard. (R 6). Not only is the strict applicat of a non-standard not "agreeable to reason," it is contrary to the mandate of the United States Supreme Court that homesteaders are entitled to a liberal interpretation of the homestead requirements. Great Northern R. Co. v. Reed, 270 U.S. 537, 456-7, 70 L.ed. 721, 725 (1926); St. Paul M & M R. Co. v. Donahue, 210 U.S. 21, 33, 52 L.ed. 941, 946 (1907); Tarpey v. Madsen, 178 U.S. 215, 220, 44 L.ed. 1042, 1044 (1899). See also United States V. Mills, 190 F. 2d 513, 521 (5th Cir. 1911) and Stewart v. Penney, 238 F. Supp. 821, 831 (D. Nev. 1965).

Appellant cleared and cultivated 20 acres, as required under 43 U.S.C.A. §164. He and his family resided on the land from 1956 - 1961. Appellant constructed a cabin, a porch to the cabin, a concrete basement, and a gravel road. (14-16). Appellant carefull followed the instructions of the Soil Conservation Service in utilizing procedures to prevent soil erosion. Appellant and his wife even went to the extent of dragging a log by hand over the property to prevent erosion. (R 22-24).

The Secretary has issued patent, in previous instances, where the entryman only cleared one half acre. John E. Tyrl, 3. L.D. 49 (1884). (See also C. below for a comprehensive discussion of "liberal" Land Decisions.) Therefore, it is not only irrational, it is unfair to apply a strict standard of cultivation to Appellant.

Surely, a 1956 homesteader on the Kenai Peninsula in Alaska, is enti to as much consideration as a 19th century homesteader.

As further evidence of the irrationality of the Secretary' decision, the Secretary relied on requirements that were not in effect at the time Appellant was proving-up (R 4-6). The Secretary also utilized regulations which were not applicable to Alaska.

Moreover, Appellant was subjected to a switch in position by the Department. The Land Office denied Appellant's final proof on the basis that he did not cultivate a sufficient number of acres. The Division of Appeals held that the processes of cultivation utilized by Appellant were not sufficient. (R4-7).

Appellant planted three acres of timothy, a perennial grass, in 1957 and ten additional acres to rye in 1958, also a perennial grass. (R14-16). Land Office employees had informed Appellant that clearing alone was sufficient during the first three entry years. (R 4). However, when Appellant found it impossible to find a tractor in 1959, he made a difficult journey to Anchorage to make certain he was complying with the requirements. The Land Office was full of people involved in oil leases. When he finally reached the counter, he was told by a Department employee that an exception on the cultivation could be granted <u>at the time of final proof</u> in cases of undue hardship or where it was impossible to perform as required. (R 23-4). Appellant relied on this informa-

tion and rented a tractor as soon as one was available and disked and sowed the last seven acres. (R 23-4) Also the Secretary, historically has been liberal in interpreting homestead requirements (See C. below). Accordingly, it is the position of the Appellant that the Secretary is estopped from relying on a strict interpretation of the cultivation requirements of 43 U.S.C.A. §164. Moser v. United States, 341 U.S. 41, 71 S. Ct. 553, 95 L.ed. 729 (1951); Great Northern R. Co. v. Reed, 270 U.S. 539, 546-7, 70 L.ed. 721, 725 (1926); Hillstrand v. State, 395 P.2d 74, 77 (Alaska 1964); Knoble v. Orr, 27 L.D. 61 (1898).

B. The trial court erred in not permitting the administrative record to be amplified.

The trial should have permitted the Appellant to amplify the administrative record.

C. The court erred in failing to find the Secretary of the Department of the Interior abused his discretion when he did not find that cultivation had been accomplished by the appellant.

In order to sustain an agency decision on appeal, the agency must show that the decision was based upon "substantial evidence". Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct 206, 217, 83 L.ed. 126 (1938). The decisions of the Secretary are entitled to respect, but, as in this case, the decision

> ...must be set aside when the record . . . clearly precludes the decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. Universal Camera Corp. v NLRB, 340 U.S. 474, 71 S. Ct 45, 95 L. ed. 456, 468-9 (1951)

Fortunately, we are not without guidance in regards to judicial review of decisions of the Secretary of the Interior which refuse to issue a patent. In a 1965 case, Stewart v. Penny, 238 F. Supp. 821 (D. Nevada 1965), which is very similar to the instant case, the land examiners of Bureau of Land Management initiated adverse proceedings to the issuance of patent. The hearing examiner dismissed the adverse proceedings. The Director of the Bureau of Land Management reversed the examiner. The Assistant Solicitor, acting for the Secretary of the Department

of the Interior affirmed the Director. The District Court of Nevada reversed the Secretary and ordered that patent issue. In regards to judicial review under the Administrative Procedure Act, the court said:

> We recognize the peculiar and specialized knowledge of the officers of the Department of the Interior respecting the interpretation of the multifarious laws and regulations relating to public lands, and that Congress has entrusted the guardianship of the public domain to the Department of the Interior. . . . we cannot, however, accept without limitations, a contention that a high administrative official in Washington, D. C. is better qualified than others to analyze and draw conclusions from a cold record produced at an evidentiary hearing three thousand miles away and relating the physical conditions with which he has questionable familiarity, conditions normally deemed to be within the realm of judicial notice. We deem the correct rule of judicial review to be that enounced in Foster v. Seaton, 1959, 106 U.S. App. D.C. 253, 271 F.2d 836: "Thus the case really comes down to a question whether the Secretary's finding was supported by substantial evidence in the record as a whole."
>
> The omnipotence of the Department of the Interior as guardian of the public domain is exhibited when the Department acts affirmatively and grants patents under the public land laws. The converse is not true. An entry or application for patent which is contested or rejected by the Secretary presents issues regarding the legal rights of the entryman under the public land laws. These are rights established by Congress which the Secretary of the Interior may not arbitarily or capriciously ignore and which must be determined within the due process safeguards of the Administrative Procedure Act. Page 827 (Emphasis supplied).

The Stewart case is peculiarly applicable, not only because it reversed a decision of the Secretary of the Interior

Department on the issuance of a patent to a homestead. The court's statements on the homestead procedures read like a page out of an Alaska homesteader's diary.

> The inadequacy of our public land laws to afford reasonable workable methods, under present conditions, for the acquisition of public lands by private citizens is a matter of growing national concern. It is of particular concern to the State of Nevada inasmuch as approximately eighty-five percent of the area of this State (the seventh largest) is still in the public domain. Much of it has a valuable potential for private use. Yet the archaic federal land laws, enacted in an era of an agraian economy, are ill-suited to an orderly disposition of the lands into private ownership. The laws were enacted with the laudable motive of enabling the penniless pioneer to acquire a home for himself and family primarily through toil and with little capital expenditure. That purpose was long ago achieved and most of the lands of the Western States which had a valuable agricultural potential, even if only marginally so, have been patented to individuals under the beneficient laws to the exclusion of the wealthy who, under a different policy, might have acquired large blocks of public lands by purchase. The inapplicability of the policy to modern conditions has, during the past quarter-century, accomplished a virtual deep-freeze of public lands in federal ownership. Page 822-3.

The Land Office denied appellant's final proof on the ground that Appellant did not cultivate sufficient acreage (R 47). The Division of Appeals inserted the position that Appellant's method of planting on the twenty acres was not "cultivation." (R 47). Thus, appellant has been required to attempt to answer what he thought was the position of the Bureau, only to be surprised at a higher appellate level with another argument.

The Secretary relied upon Regulations and Land Decisions involving cultivation requirements which were not in effect at the time appellant was proving up (R 5-6). Therefore, these authorities are inappropriate as a basis upon which to base an agency decision. United States v. Macdaniel, 32 U.S. (7 Pet.) 1, 14, 15, 8 L.ed. 527 (1833); Bowen v. Hickey, 200 Pac. 46 (Cal. 1921), cert. denied, 257 U.S. 656, 66 L.ed. 420. It is certainly less than fair to expect a homesteader on the Kenai Peninsula in Alaska, in 1956, to comply with non-existant requirements.

Appellant explained that he was informed by land office employees that clearing was sufficient during the first three entry years. (R 4). Further, appellant testified that when, in 1959, he discovered he could not obtain a tractor, he travelled to Anchorage to explain the situation to the land office. The office was full of people involved in oil leases. After waiting a considerable length of time, he was told by a land office employee that an exception on the cultivation could be granted at the time of final proof. Relying on this information, appellant rented a tractor as soon as one was available and disked and sowed the last seven acres to rye. (R 23-4). In spite of the above, the Secretary, although the decision is not clear on this point, continues to rely on the position that the number of acres cultivated was not sufficient. (R 5). Further, appellant's testimony stands unrebutted

that it is the policy of the Bureau in the land area in question not to require cultivation until application is made for patent and that the Bureau has waived cultivation requirements on other patent applications. It is the position of the appellant that by reason of appellant's reasonable reliance on the information and suggestions of Department employees and the course of conduct of the Department, the Secretary is estopped from relying on and may not rely on a strict interpretation of the cultivation requirements of 43 U.S.C.A. § 164. Moser v. United States, 341 U.S. 41, 71 S.Ct. 553, 95 L.ed. 729 (1951). A homesteader should not suffer because of the actions of the Land Office. Great Northern R. Co. v. Reed, 270 U.S. 539, 546-7, 70 L.ed. 721, 725 (1926); Hillstrand v. State, 395 P.2d 74, 77 (Alaska 1964); Knoble v. Orr, 27 L.D. 61 (1898).

In his decision, the Secretary admitted that there is no fixed standard as to what constitutes cultivation for homesteading. Nevertheless, the Secretary applied inappropriate and retroactive authorities to find that the planting of timothy and rye was not "cultivation." Further the Secretary reasoned that even though there is no standard for cultivation, the non-standard must be strictly enforced and no departure therefrom is permitted. (R 6).

Not only the logic of the Secretary is subject to questio A close study of the Land Decisions and other authorities indicates that Appellant's efforts were clearly sufficient. The law only

requires substantial compliance, not absolute compliance. 42 Am. Ju Public Lands § 22, p. 801. In Oregon & C.R. Co. v. United States, 189 U.S. 102 47 L.ed. 726 (1902) the Supreme Court held in favor of individuals where:

> Each person made his settlement with the intention of making a homestead entry of the lands, whenever that could be done under the Acts Congress. After the date of settlement each settler continuously resided and made improvements upon his land in the way of a dwelling house, barn, outhouses, fencing, clearing, and planting of trees. Page 729. (Emphasis supplied).

In Findley v. Ford, 11 L.D. 172 (1890), the Secretary accepted Ford's proof over objections based on the following:

> He testified that he had lived there continuously since making the filing; that he was an unmarried man, and had worked some for his neighbors, but slept at his house generally when so working; he had cleared and prepared for plowing some four acres of ground and had plowed about two acres; he had also prepared about one hundred fence posts preparatory to fencing his land. Page 173 (Emphasis supplied).

In John E. Tyrl, 3 L.D. 49 (1884), the Secretary reversed the cancellation of an entry.

> The proof also shows that Tyrl has cleared "about one half acre" of said land, but has cultivated no portion of it nor raised any crop thereon.
>
> The reason given by Tyrl for non-cultivation is that he settled too late.
>
> It is not denied by the counsel for the appellant that the commutation proof required by said Section 2301 must show some cultivation by the entryman. It is, however, insiste that, in this case, the clearing of about one half acre, taken in connection with the time of settlement, and the

other proof offered, is a sufficient compliance with the requirement of said section.

Cultivation, as defined by Webster, is "the art or practice of cultivating; improvement for agricultural purposes; tillage; production by tillage".

It is clear that the kind of labor, as well as the amount required to prepare agricultural land for tillage, will depend upon the character of the land sought to be cultivated.

The clearing of the land covered with timber is as essential to successful cultivation of the soil as is the actual planting of the seed.

The real question at issue is the good faith of the entryman. Page 49 (Emphasis supplied).

Likewise, in Charles L. Hofwalt, 9 L.D. 1 (1889), the Secretary held that the following proof was sufficient:

The proof shows that Hofwalt was a single man and that his improvements consisted of a frame house eight by ten feet, a well and five acres of breaking -- total value $45.00. His residence from February 27, 1882, to April 9, 1883, the date of final proof, was continuous.

Although the improvements are somewhat meagre they are not inconsistent with good faith, which is the fundamental principle upon which the right of pre-emption exists. Page 2 (Emphasis supplied).

In Holman v. Hickerson, 17 L.D. 200 (1893), the Secretary upheld the proof of a woman entryman with language indicating that requirements are not strictly enforced.

The remaining questions in the case relate to the character of her residence and improvements on the land, and whether or not they show good faith on her part.

In determining these questions, the degree and condition

in life of the entryman may properly be taken in consider tion.....

She testified that in December, 1888, she put one acre in potatoes and turnips and other vegetables, and that in December, 1889, she plowed and raised five acres of wheat She paid for the work by work of her own, as she had no means except what she had earned.

After an examination of the evidence, I am of the opinion that she had an honest intention to comply with the law, and that her improvements were commensurate with her mean Page 202 (Emphasis supplied)

In contrast to the minimum efforts approved by the Secret above, Appellant's final proof showed that three acres had been planted in timothy and seventeen acres in rye. Appellant built a 16' by 20' cabin; a 7' by 14' porch; a 26' by 30' concrete basement and gravel road (R 14-16). Appellant testified:

We moved on the homestead in August, 1956, and in Septemb 1956, we had three acres of land cleared. In June of 195 I rented a tractor, plowed and disked the three acres. Upon completion of the above, it became apparent that sum or fall clearing was not the proper time to clear land as it took most of the moss off and left the soil subject to wind and water erosion. Immediately after we completed the disking, we sowed it with alsike clover and timothy, neither of which are an annual crop, as they both come back year after year and afford good protection against wind and water erosion. Neither of these are native to Alaska and therefore cannot be considered as native grasses. After sowing this three acres, my wife and I got a log approximately twelve feet in length and eight inches in diameter, weighing over 100 pounds and attached a rope to both ends. We then pulled this by hand over the entire three acres in an effort to pack the top soil and to prevent erosion. This crop has continued to grow each year, with the exception of the last two years when most of it was killed due to a lack of snow covering and severe icing. Every fall a group of horses have been

loose in the area and have heavily grazed on all my fields

> Having been advised by the Soil Conservation Service that the best time to clear Alaskan land was in the early spri before the thaw occurred, I hired Mr. Morris Coursen to clear ten acres. In June, after he had cleared this land, I again was able to rent a tractor and, again upon the advice of the Soil Conservation Service, instead of plowing the land, I had it disked. This disking had an effect of mixing a small amount of top soil with what moss was left. This was the condition that had been recommended by the Soil Conservation Service people to prevent erosion of the land. We then planted it heavily with Rye Grass, again not a native grass of Alaska. This also was grazed upon by several horses running loose. (R 22-3) (Emphasis supplied). (The cultivation of the remaining seven acres has been explained above.)

The Final Proof and the above unrebutted testimony of Appellant clearly invalidates the contention of the Secretary that there was not a bona fide compliance with the law. The position of the Secretary that these efforts "were no more than a token compliance" (R 6) is not only without foundation, it is insulting. Homesteading in Alaska, where the climate varies from the upper 70s with mosquitoes to minus 40 below, is no easy task, as indicated by the proof and testimony of appellant.

Determination of what is satisfactory cultivation for the issuance of a homestead patent is not within the peculiar competence of the Department of the Interior and is subject to judicial review. In the 1965 case of Stewart v. Penny, 238 F. Supp, 821 (D. Nev. 1965), the court specifically set aside the Secretary's determination that cultivation was not sufficient, both as to number of acres

planted and as to method--the two basic issues in the instant case. Accordingly, the court's language is set forth at length.

Acreage Cultivated

On the issue of acreage cultivated, the Hearing Examiner stated that he could not find that 20 acres were cultivate as alleged by contestee Stewart, but that "neither can I find that less than one-eighth of the entry (15 acres) was cultivated as alleged by contestant." The Examiner then volunteered the opinion that the burden of proof was on the government. We do not agree. The Administrative Procedure Act imposes the burden of proof on "the proponent of a rule or order." (5 U.S.C. §§ 1006 /c/. In our case, Stewart's Homestead Entry Final Proof, filed January 4, 1959, was an application for patent. Procedurally, the Contest Complaint filed by the Department was, in effect, an Answer to the Final Proof affirmatively specifying the alleged deficiencies. Procedure by way of a Contest Complaint is justified because the Final Proof is not in the form of a pleading and does not lend itself readily to a definition of issues by answer thereto The procedural regulations then in effect (43 C.F.R. 221.7 1961 Regulations) provided that on hearing of a governmen contest, the contestant would first present his case. It does not follow therefrom that the burden of proof is on the government. The correct rule is stated in Foster v. Seaton, 1959 106 U.S. App. D.C. 253, 271 F.2d 836, involving a mining claimant. The reasoning there expressed is equally applicable to a homestead entryman. The true proponent of the rule or order is the applicant for patent or other right to public lands claiming compliance with the public land laws. The government "bears only the burden of going forward with sufficient evidence to establish a prima facie case and the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid."

The Director, in his decision, interpreted the Examiner's finding with respect to the acreage cultivated as a findi that in excess of fifteen acres had been "cleared." This court considers it a finding, negatively expressed, that fifteen acres had been cultivated.

The Secretary deliberately restricted his reasons for affirming the cancellation of the entry to the findings: "the entryman did not apply the process of cultivation whi he employed to the required 1/8 of the entry." (Italics added). This is the finding of the final agency authority which is subject to judicial review. If arbitrary and unsupported by substantial evidence and not in accordance with law, the decision based on the finding should be reversed.

The finding is based upon a very thorough and careful analysis of the testimony and surely is not arbitrary in the sense of being capriciously made without due considera tion of the evidence. The finding, nevertheless, in our opinion, is unsupported by the evidence and was made without regards for the principle that the homestead laws should be liberally interpreted in favor of the entryman.

Most of the state of Nevada is rough, hard, dry country. Water is in short supply. The reclamation of this land fo agricultural use is not easy, and the area here in questio is of the kind described. The "process of cultivation" which this entryman applied were suitable to the homestead. He intensively cultivated from one to two acres near his house, growing corn, potatoes, strawberries, sweet potatoes, peanuts and onions. He brought water to the area by pipeline and plastic hose for the irrigation of the produce. He cleared an additional fourteen acres adjoining the garden plot and frome one to three acres near the north boundary of the homestead. These areas he plowed, seeded to rye, harrowed and irrigated, by hose and sprinkler to the extent of his capacity and the resources available. On a portion of the land, he left windrows of sagebrush to stay erosion by prevailing winds, which were subsequently removed by bulldozer in 1958 and 1959.

The adequacy of the acreage involved in this activity is not open to substantial doubt. It was surveyed by a licensed civil engineer, a witness for Stewart, who surve 15.2 acres of cleared land in the larger parcel and 3.1 acres in the smaller. A registered surveyor for the Bureau of Land Management surveyed and located the boundaries of the 120 acre homestead entry and prepared a map (Exhibit R) on which he accurately located the

reservoir, road, pipeline, well, houses, and other improve ments on the property, and the elevations and contour line The government surveyor did not testify. The map he prepared did not show the boundaries of the cleared area. These boundaries were superimposed thereon in pencil by a government land examiner who had used "pacing" method of estimating boundaries and distances and estimated 12.5 acres in the large cleared area and one acre in the smaller. The actual survey by a registered civil engineer must be given credence over an estimate of acreage based on pacing distances and boundaries.

Stewart testified by reference to an aerial photograph of the farm. It is true, as suggested by the Secretary, that there were some distortion of distances because of the perspective. Nevertheless, the cleared areas are obvious on the photograph, and are, by comparison, the same cleared acres surveyed by Stewart's surveyor. Stewart, by reference to the photograph, showed that he had cultivated and planted rye on over half the cleared area in 1956 and planted rye on the whole cleared area in 1957 and 1958. Mrs. Stewart testified that all the cleared area was in rye for three years. This testimony clearly supports a finding that the entryman did apply the processes of cultivation which he employed to the required one-eighth (15 acres) of the acreage of the entry.

The Secretary relied heavily upon the failures of other witnesses to testify positively to cultivation of the entire cleared acreage. In our view, their testimony strongly corroborates that of Mr. and Mrs. Stewart with respect to the employment of processes of cultivation on the homestead entry. It should not be expected they could testify to a specific number of acres, or that they saw a crop growing on the entire area. Their testimony is not inconsistent with Stewart's claim of having plowed, seeded and harrowed the whole field. On the contrary, the testimony corroborates his claim to the extent that the witnesses did see, observe and remember. The presence of brush windrows on a portion of the land, later removed, does not detract from the cultivated area. Such windrows may be considered an aid to cultivation and were one of the processes of cultivation employed by the entryman. The careful analysis of the testimony made by the Secretary demonstrates that there is no substantial evidence to support a finding that the entryman did not

apply the processes of cultivation which were employed to one-eighth of the entry.

The fact Stewart's rye crop failed because of freezing, depredations by mice, rabbits and other rodents, and invasions of ranging livestock (the entry was unfenced) are irrelevant to this inquiry, except insofar as they account for the inability of some of the witnesses to see evidence of a rye crop at different times -- periods of observation.

Conclusion

We have related the administrative history of this case at some length. The varying approaches to decision adopted in the administrative heirarchy seem to us to stem from a basic feeling that the area was not properly classified for homestead entry. This may or may not be so Perhaps it would have been more prudent to classify less than the entire 120 acres covered by the amended application as suitable for homestead entry. Once the entry was allowed, however, the entryman had to do what was necessary to comply with the statutory requirements to be entitled to patent. The photographs, maps and testimony prove that he did so, taking into consideration "the degree and condition in life" of the entryman and the obstacles of nature and environment with which he contended. Pages 831-33. (Emphasis supplied).

The effect of the Stewart case on the Secretary's decision in the instant case is devastating. Like the land in Nevada, the land on the Kenai Peninsula is difficult to homestead. The Secretary indicated that the planting of rye was not cultivation. (R 6 However, Stewart indicates that the planting of rye is sufficient cultivation for homestead purposes. Stewart v. Penny, supra, at page 832. The case also holds that prevention of erosion is one of the processes of cultivation. Ibid, at 832. Therefore, appellant's

efforts at preventing erosion on the land in question qualify as a process of cultivation. (R22-3). Noticeably absent from the opinion is the requirement of the Secretary (R 6) that a homesteader must establish a profitable agricultural operation.

Finally, and most important, Stewart sets to rest, hopefully, for good, the untenable contention of the Secretary that even though there is no standard of cultivation, this non-standard must be strictly applied. Stewart follows the overwhelming weight of authority that an entryman is entitled to a liberal interpretation of the requirements of homesteading and is not to be subjected to a narrow interpretation. Page 831. Rather than the ridiculous no variance approach of the Secretary, the court instructed that it should be determined whether the processes utilized were suitable to the land in question (page 831); the age and ability of the entryman were to be considered; and the obstacles of nature and environment with which the entryman contended were to be taken into consideration (page 833). The efforts of Appellant as set forth above, clearly qualify under the standards set up by the Stewart case.

The Land Decisions of the Secretary set forth, supra, are in accord with the approach of the Stewart case. Indeed, the Assistant Solicitor who wrote the Secretary's decision did not follow the guide lines of his superior, the Solicitor, Department of

the Interior. Testifying before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, Solicitor Frank J. Barry specifically rejected a strict interpretation of the homestead requirements.

> There is elasticity; I am all in favor of exercising it..
>
> Sometimes perhaps if the elasticity appears in a particular fact situation, if the discretion, a discretionary act is possible, I assure the Senator we are most anxious to find it and to exercise whatever elasticity there may be. Hearings on S. 758, page 105, May 6, 7, 1963. (emphasis supplied)

Senator Simpson likewise did not agree with a strict approach.

> In the Government I think so, too, and I think probably it lies in this too strict adherence to the letter of the law, wherein I think you have not only the responsibility but I am sure that you have the elasticity to make proper decisions, and I think that the analogy carried between the civil and The Federal and the people see that in these cases that we point out these inequities that bring the difficulty to the Department.
>
> I think the departments have not only the responsibility but the elasticity to make decisions, rather than to conform to the letter of the law.
>
> ***
>
> I think that the elasticity is there as well as the responsibility and it could be done by the departments, a I think it is that narrow adherence to the letter of the law that doesn't give the equity where it belongs, that doesn't place the equitable load upon the person that puts you in dispute, puts our departments in disrepute with the Government or with the people, and I think it is that type of thing this committee is trying to remedy.

> I don't think we are going to do any good by insisting upon just a strict adherence to the letter of the law, wh you have got the power in the Department with your direction to do what is necessary. Ibid, at pages 104-5. (Emphasis supplied)

Therefore, the Secretary abused his discretion when he refused to issue patent by reason of insufficient cultivation. On the entire record, the Secretary's decision must be reversed as not being founded upon substantial evidence, and patent should issue to Appellant, with subsurface rights.

D. The Court erred by not granting Appellant's prayer for equitable relief.

By decree of the United States Supreme Court, a homesteader is not to be subjected to a strict interpretation of the homestead requirements, as suggested by the Secretary. (R 6)

> The decisions of this court have established the principle that one who, in response to the invitation in the homestead law, actually settles on the public lands in an honest effort to acquire a home should be dealt with leniently and not subjected to the loss of his toil and efforts through any mistake or neglect of the officers or agents of the government. Great Northern R. Co. v. Reed, 270 U.S. 539, 546-7, 70 L.ed. 721, 725 (1926) (Emphasis supplied)

> As to the second aspect, that is, the nature and character of the acts of the settler essential to initiate and preserve a claim to land as against the government, the rulings of the Land Department have been liberal towards the settler, and his good faith and honest purpose to comply with the demands of the statute have primarily been considered, thus carrying out the injunction of this court in Tarpey v. Madsen, 178 U.S. 220, 44 L.ed. 1044, 20 Sup. Ct. Rep. 849, and cases there cited, to the effect that regard should be had, in passing on the rights of settlers, to the fact that "the law deals tenderly with one who, in good faith, goes upon the public lands with the view of making a home thereon." The general course of the Land Department on the subject is illustrated by two decisions, Findley v. Ford, 11 Land Dec. 173 and Holman v. Hickerson, 17 Land Dec. 200. St. Paul M & H R Co. v. Donohue, 210 U.S. 21, 33, 52 L.ed. 941, 946 (1907) (Emphasis supplied). See also United States v. Mills, 190 F.2d 513, (5th Cir. 1911); Stewart v. Penney, 238 F. Supp. 821, 831 (D. Nev. 1965).

Instead of treating appellant with the liberality in interpretation to which he is entitled, the Department switched positions at different appellate levels, utilized in appropriate

regulations and requirements, and attempted to apply the latter retroactively. (R4-6) Appellant relied on statements of Department employees and, subsequently, the Secretary refused to consider these statements. (R4-6). Most discouraging to appellant has been the application by the Secretary of a strict interpretation of cultivation even though the Secretary concedes that there is no standard of cultivation. (R 6)

Not only is the position of the Secretary contrary to the liberal interpretation required by the United States Supreme Court, it is without a logical foundation. The type of conduct utilized by the Department in this case has led to public distrust of the Department of the Interior. One individual has suggested a complete overhaul of the "fantastically complex" regulations of the Bureau of Land Management. Howard Pollack, Anchorage Dailey Times, Page 1 (7 July 1966). Similar conduct by the Department of Interior personnel has been condemned by members of Congressional committees. In words of Alaska's Senator Gruening:

> The largest part of our complaints come from people who apparently have complied with the law and the regulations as they were informed they were, and then somehow out of the blue comes a decision which cancels all that, and tells them they did it wrong, and they should do it differently...
>
> ***
>
> Of course, I can't remember them all, but they frequently seem to hold manifest injustices where people have appar-

ently complied, the Bureau changed its mind, the regulatic has been changed, and the conditions have been changed, ar the people are just out.

Senator Simpson. Will the Senator yield for a question?

Senator Gruening. Yes, indeed.

Senator Simpson. Isn't it true we have had cases from your State in which we have had to bring bills for relief for the people who have had some injustice done them as a result.

Senator Gruening. Precisely, and it is not always easy to get those through. In the case of two or three it has taken us 3 or 4 years to get one injustice rectified.

***

The impression widely obtains in Alaska, and this not only true of the Bureau of Land Management, it is true of almos every Federal agency, that the Government officials are enemies of the people. Instead of trying to help them, they are there to impose every possible obstacle to find flaws in everything they do.

Instead of assisting them, there is a constant struggle. Now is that necessary? It seems to me that if we want to strengthen the faith of the people in our Government which it is certainly desirable to do, we should have a differen attitude.

***

I think maybe that is an administrative matter and it is a question of attitude. But we sometimes feel that Govern ment officials in Alaska take the same position that they are supposed to be taking in a police state. People don't like it, and I can understand why they don't, and I don't like it. Hearings before the Subcommittee on Public Lands of the Committee on Interior and Insular Affairs, United States Senate, S. 758, pages 102-3 (May 6-7, 1963).

What is required of a homesteader is that he, in good fait

go upon the land involved and occupy and live upon the land by maki the same a home to the exclusion of a home elsewhere. Great Northe R. Co. v. Reed, 270 U.S. 539, 70 L.ed. 721, 725 (1929); United Stat v. Richards, 149 Fed. 443, 450 (D. Neb. 1906), cert. denied. 218 U.S. 670, 54 L.ed. 1203. See also Whaley v. Northern Pac. R. Co., 167 Fed. 664, 670 (D. Mont. 1908). A homesteader who does this is entitled to equitable considerations. Massey v. Malachi, 11 L.D. 191 (1890).

Appellant resided on the land in question from 1956 throug 1961. He planted timothy and rye on the requisite 20 acres. He constructed a cabin, a porch on the cabin, a basement, and built a gravel road. (R14-16). He followed carefully the soil conservation suggestions of the Soil Conservation Service. Appellant cleared land by back-breaking work. He and his wife pulled a huge log over the property to prevent erosion. Appellant made a difficult trip to Anchorage to make sure he was complying with the homestead requirements. (R22-4). Therefore, he was clearly in good faith and did occupy and live on the land, making it his home to the exclusion of a home elsewhere.

It is the position of the Appellant that he has satisfactorily complied with the homestead requirements and is entitled to the issuance of a patent to the entire 160 acres, with subsurface rights. At the very least, appellant is entitled to the issuance

of patent to 104 acres with subsurface rights. Appellant fought his way through three levels of administration appeals and received the "rubberstamp" treatment so common in these cases. Senator Simpson, Hearing before the Subcommittee on Public Lands, Committee on Interior and Insular affairs, United States Senate, page 99 (May 6 & 7, 1963). Appellant is now engaged in the second of his Judicial appeals. Clearly, he is entitled to relief.

VII. CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FISHER and HORNADAY

James C. Hornaday

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